United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7339

In The

UNITED STATES COURT OF APPEALS

For The Second Circuit

BRITISH AIRWAYS BOARD and
COMPAGNIE NATIONALE AIR FRANCE,
Plaintiffs-Appellees,

v.

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY and WILLIAM J. RONAN, W. PAUL STILLMAN, JAMES G. HELLMUTH, VICTOR R. YANITELLI, ANDREW C. AXTELL, GEORGE F. BERLINGER, MILTON A. GILBERT, ROBERT R. DOUGLAS, JAMES C. KELLOGG,III, GUSTAVE L. LEVY, MATTHEW NIMETZ, ALAN SAGNER,
Defendants-Appellees,

and

TOWN OF HEMPSTEAD, INCORPORATED,
VILLAGE OF LAWRENCE, INCORPORATED,
VILLAGE OF CEDARHURST, INCORPORATED,
VILLAGE OF ATLANTIC BEACH, and
ROBERT F. CHECK, MONA GOTTESMAN, and
HERBERT WARSHAVSKY
Applicants for Intervention-Appellants.

On Appeal from Order of United States District Court
for the Southern District of New York,
Judge Milton Pollack,
Denying Appellants' Motion to Intervene

BRIEF OF APPELLEES BRITISH AIRWAYS BOARD AND COMPAGNIE NATIONALE AIR FRANCE

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TOWN OF HEMPSTEAD, INCORPORATED, et al.,

Applicants for Intervention-Appellants.

BRIEF OF APPELLEES BRITISH AIRWAYS BOARD AND COMPAGNIE NATIONALE AIR FRANCE

Plaintiffs-appellees British Airways Board and Compagnie Nationale Air France submit this brief in opposition to the appeal of Town of Hempstead, Incorporated, et al., from an order denying their application for intervention. The order was entered in the United States District Court for the Southern

District of New York (Pollack, J.) on July 6, 1976, and is reprinted in applicants' Appendix. (App. 112.)

ISSUES PRESENTED FOR REVIEW

1. Whether the court below committed reversible error in denying applicants' motion to intervenue under Rule 24(a) of the F.R.Civ.P., without prejudice to renewal of the motion upon good cause shown, (a) where the suit presented only legal issues to be resolved by the court and where the court granted applicants the privilege of participating fully in the proceeding as amici, and (b) where applicants failed to show:

(i) that they had a direct, legally protectable interest in the proceeding; or

(ii) that their ability to protect their interests would be impaired by any disposition of the proceeding; or

(iii) that their interests were inadequately represented by the original party-defendants.

2. Whether the court below abused its discretion in denying applicants' motion to intervene under Rule 24(b) of the F.R.Civ.P., where the court found that intervention would confuse the proceedings and prevent a prompt adjudication of the narrow legal issues presented in the lawsuit.

STATEMENT OF CASE

1. Background

On February 4, 1976, after extended and wide-ranging proceedings, United States Secretary of Transportation William T. Coleman issued a lengthy decision which granted British Airways and Air France the right to operate Concorde supersonic aircraft to and from John F. Kennedy International Airport.* On April 6, 1976, pursuant to Secretary Coleman's decision, the Federal Aviation Administration issued amended operations specifications to British Airways and Air France authorizing such flights and specifying such limitations as the number of flights per day, the time of day flights would be permitted and particular flight procedures to be employed. These amended operations specifications were the final items of authority required by plaintiffs to conduct Concorde operations at JFK. Petitions for review of Secretary Coleman's decision were heard by the Court of Appeals for the District of Columbia Circuit on May 19, 1976, which on the same day affirmed that decision in all respects. Environmental Defense Fund, et al. v. U.S. Dept of Transportation, et al., Civil No. 76-1105 (D.C. Cir. May 19, 1976).

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* The Decision also authorized flights to and from Dulles International Airport serving metropolitan Washington, D.C. Service commenced there on May 24, 1976, and continues to this date. Secretary Coleman's decision is Exhibit A to plaintiffs' motion for summary judgment.

JFK is operated by the Port Authority of New York and New Jersey. In response to a notice by British Airways and Air France that they intended promptly to commence the authorized operations at JFK (Exhibit A to Complaint, App. 33), the Port Authority adopted a Resolution on March 12, 1976, that purported to prohibit such flights pending, among other things, its review of pertinent data on Concorde operations.

On March 17, 1976, plaintiffs commenced this suit seeking declaratory and injunctive relief against acts or omissions of the Port Authority, such as its Resolution, that purported to prohibit what the federal government has expressly authorized. (Complaint, App. 2.) On April 6, the Port Authority answered, generally denying the allegations of the Complaint. (App. 43.)

In denying applicants' motion to intervene, the district court correctly found that the following issues were presented:

> "The instant lawsuit will not resolve the merits of the supersonic aircraft, but simply the power and authority of a local airport to deny entry to a plane whose flights have been specifically approved by the federal government." (App. 113-14.)

Since no factual issues were raised by the pleadings, plaintiffs moved for summary judgment on July 12, 1976. The Port Authority filed its answering brief on August 17, 1976. On that same date, various amici, including the State of California and a group headed by Friends of the Earth, Inc.

(whose motion to intervene had also been denied), filed extensive papers in support of the Port Authority's position. Despite the express invitation of the district court to the applicants to submit their views as amici, they failed to submit any papers in response to plaintiffs' motion.

By an order of September 3, 1976, plaintiffs' summary judgment motion is now returnable January 17, 1977. Additional papers concerning the motion are to be filed in advance of that date pursuant to a schedule fixed by the district court.

2. Facts Giving Rise To This Appeal

Applicants' motion to intervene was filed approximately eight weeks after the action was commenced. The moving papers allege that applicants are a town and three incorporated villages in Nassau County near JFK and three individual residents of those communities. In support of their claim of "interest" in the pending litigation, applicants assert that operation of Concorde at JFK would: (i) affect their use and ownership of property in the vicinity and (ii) have a generally adverse environmental impact. (See Applicants' Motion ¶ 13-16, App. 63-65.) They make no claim that any of them has the right, power or authority to adopt or enforce any resolution, order or the like that would affect Concorde operations at JFK,* nor do they claim any right or entitlement which would

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* See American Airlines, Inc. v. Town of Hempstead, 272 F. Supp. 226 (E.D.N.Y. 1967), aff'd, 398 F.2d 369 (2d Cir. 1968), where it was held that such power does not exist.

require the Port Authority to regulate Concorde on their behalf. Moreover, applicants allege no right, claim or defense that they could independently assert against plaintiffs.

The district court held that applicants had no right to intervene because of their failure to establish that the existing representation of the applicants' interests would be inadequate: "there is no reason to presume that the Port Authority will not vigorously and conscientiously defend the action which has been brought against it." (App. 113.) The court also denied applicants' motion to intervene by permission pursuant to Rule 24(b) because:

> "the applicants for intervention might well be tempted to focus their attention on the aspects of the Concorde's operation of greatest concern to them, as opposed to the narrow legal questions placed in issue by the pleadings in this action." (App. 114-15.)

The court said, however, that applicants could participate fully in the case by submitting briefs as amici curiae, and it provided that the denial of intervention was without prejudice to applicants' renewal of their motion if they could "make a factual showing that the Port Authority is not vigorously litigating any aspect of the case." (App. 114.)

Applicants' motions for a stay of proceedings were denied by the district court on July 23 and by this court on August 17.

ARGUMENT

Applicants have failed to establish that they meet any of the tests for intervention of right under Rule 24(a). To the contrary, the "interests" they allege in the lawsuit are insufficient; their ability to protect these interests will not be impaired by the outcome of the lawsuit between plaintiffs and the Port Authority; and the Port Authority will adequately represent any interests that applicants may legitimately have in the subject matter of the suit.

Further, the denial of permissive intervention under Rule 24(b) was entirely within the trial court's discretion.

The district court's decision was proper and should be affirmed.

I

INTERVENTION AS OF RIGHT WAS PROPERLY DENIED

A. Applicants Lack A Concrete, Specific Interest in the Subject Matter of Plaintiffs' Lawsuit

Applicants made no showing in the court below of any legal interest they have in the specific subject matter of this lawsuit -- whether the Port Authority may deny entry to a plane whose flights have been specifically authorized by the federal government. Their proposed answer merely asserts, vicariously, certain alleged rights of the Port Authority. This failure to assert an interest based on rights of their own, as opposed to alleged rights of an existing party, is fatal to applicants' motion. The cases clearly require that an applicant for intervention as of right must show a "direct, substantial, legally protectable interest in the proceedings." Hobson v. Hansen, 44 F.R.D. 18, 24 (D.D.C. 1968); Diaz v. Southern Drilling Corp., 427 F.2d 1118, 1124 (5th Cir.), cert. denied, 400 U.S. 878 (1970). As Chief Judge Edelstein recently said after an exhaustive review of the existing cases:

> "The teaching of these cases is that an interest, to satisfy the requirements of Rule 24(a)(2), must be significant, must be direct rather than contingent, and must be based on a right which belongs to the proposed intervenor rather than to an existing party to the suit." In re Penn Central Commercial Paper

Litigation, 62 F.R.D. 341, 346 (S.D.N.Y. 1974), aff'd without op., 515 F.2d 505 (2d Cir. 1975). (Emphasis added)

In the context of plaintiffs' suit against the Port Authority, applicants' claim that Concorde flights may cause them physical injury and property damage does not meet this requirement. Nor does their alleged "interest" in plaintiffs' pending suit stand, as it must, "at the center of the controversy." United States v. CIBA Corporation, 50 F.R.D. 507, 513 (S.D.N.Y. 1970). The issue in this case is whether the Port Authority has the power to prohibit what the federal government has authorized. The alleged "interest" of the applicants is no more than a claim of a generalized opposition to Concorde flights, which has nothing to do with the specific, clearly defined legal issue raised by the pending suit. Applicants have no "legally protectable" claim or defense of their own relating to that issue. Thus, their motion was properly denied. See Arvida Corporation v. City of Boca Raton, 59 F.R.D. 316, 320-21 (S.D. Fla. 1973). See also Donaldson v. United States, 400 U.S. 517 (1971); United States v. 936.71 Acres of Land, State of Fla., 418 F.2d 551, 556 (5th Cir. 1969); Kheel v. American Steamship Owners Mut. Pro. & Indem. Ass'n, 45 F.R.D. 281, 284 (S.D.N.Y. 1968).

B. Applicants' "Interest," If Any, Will Not Be Impaired by Denial of Intervention

Applicants also failed to satisfy the second test an

applicant must meet to establish a right to intervene, that is, that he is "so situated that the disposition of the action may as a practical matter impair or impede his ability to protect [his] interest." Applicants' principal argument below was that a decision adverse to the Port Authority "could operate as stare decisis setting a precedent on a new issue, difficult to overcome in any later actions brought by applicants against either one or both of the two plaintiffs, or against the defendants for claims based upon the illegal operations by the plaintiffs of the Concorde aircraft at JFK." (App. 66.) However, applicants have asserted no independent claim based on the power or lack of power of the Port Authority to ban the Concorde from JFK. Thus, there is "little likelihood" in the present case that novel legal issues will be decided that might affect the merits of any claim which applicants may assert in some future litigation. Ionian Shipping Company v. British Law Insurance Co., 426 F.2d 186, 191 (2d Cir. 1970).

But, whether or not stare decisis is pertinent, Judge Pollack's order completely protects the interests of applicants by offering them the opportunity to participate fully in the proceedings as amici and by inviting them to renew their request for intervention if present circumstances should change. They are in a position, therefore, to address their legal arguments on the narrow question presented and otherwise

to protect any interests they believe are endangered by a resolution of that question. In the actual circumstances of the litigation, the privilege of participating as amici is equally as useful to applicants as party status would be. No party claims that there are disputed issues of material fact; accordingly, the issues which are before the Court on the motion for summary judgment will presumably conclude the case. To date, applicants have declined the opportunity to participate in briefing that motion, although an amicus, no less than a party, is entitled to argue that as a matter of law summary judgment should be denied, or to point to a genuine factual issue, if one exists, as a reason why summary judgment should not be granted.

C. The "Interest" Claimed by Applicants in the Lawsuit Is Adequately Represented by the Port Authority

Plaintiffs have raised a narrow legal issue -- whether the Port Authority has the power to ban Concorde flight operations at JFK. Plaintiffs assert that such a ban violates the treaty obligations of the United States and is preempted by federal responsibility for the conduct of this country's foreign relations and for the regulation of aircraft flight operations. Further, plaintiffs contend that any attempt by the Port Authority to ban Concorde flights is in direct conflict with

the decision of Secretary Coleman authorizing the specific flights in question. The Port Authority asserts that it has the power, right and authority to adopt and enforce its Resolution imposing an interim ban on Concorde flights at JFK; it has responded vigorously to plaintiffs' challenge to that alleged power.

To the extent that applicants have alleged any "interest" in this lawsuit, it amounts to an interest in having the Port Authority's assertion that it has the power to ban the Concorde sustained. In this, the Port Authority has an identical interest. Indeed, applicants candidly concede in their opening brief that they seek an outcome in this suit identical to that sought by the Port Authority (see Br. 16) but argue that this is not determinative.

United States v. International Business Machines Corp., 62 F.R.D. 530 (S.D.N.Y. 1974), cited by Judge Pollack in denying applicants' motion for intervention is directly in point, and supports his specific finding that the Port Authority's representation is entirely adequate.*

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* Applicants bear the burden of establishing that their interests are not adequately represented -- and "[t]he potential obstruction and delay which may be caused by allowing a person to intervene as a party to a suit fully justify the requirement that he make a clear showing rather than a mere allegation that his interest is not adequately represented by an existing party to the suit." United States v. International Telephone & Tel. Corp., 349 F. Supp. 22, 27 n.4 (D. Conn. 1972), aff'd without op, 410 U.S. 919 (1973).

Applicants in challenging this finding resort to rhetorical claims that the Port Authority "has traditionally been opposed to the efforts of applicants to obtain relief from jet noise" (Br. 18), and that the interest of the Port Authority in obtaining immunity from applicants' tort claims created by Concorde flight operations renders it incapable of defending the interest applicants assert in the suit. The argument is without merit.

Applicants' generalized assertion that the Port Authority has proven itself insensitive to the problems of aircraft noise and is a traditional foe of those who would seek to reduce noise levels is without any record basis and is, in any event, irrelevant. Certainly it is true that the Port Authority joined in both American Airlines, Inc. v. Town of Hempstead, 272 F. Supp. 226 (E.D.N.Y. 1967), aff'd, 398 F.2d 369 (2d Cir. 1968), and Allegheny Airlines v. Village of Cedarhurst, 132 F. Supp. 871 (E.D.N.Y. 1955), aff'd, 238 F.2d 812 (2d Cir. 1956). In these earlier cases, Hempstead and Cedarhurst attempted to interfere with the regulation of flight operations into JFK, and the Port Authority vigorously opposed such efforts. The participation of the Port Authority in these lawsuits demonstrates that it traditionally has been jealous of its regulatory authority over such flight operations and has actively tried to defend it. Indeed, it has frequently acted to enforce its own regulations when challenged directly or indirectly. See, e.g.,

Wolin v. Port of New York Authority, 392 F.2d 83 (2d Cir. 1968); Port of New York Authority v. Eastern Air Lines, Inc., 259 F. Supp. 745 (E.D.N.Y. 1966). This case involves precisely such a challenge, and thus the Hempstead and Cedarhurst cases support, rather then counter, the adequacy of the Port Authority's representation of applicants' interest.

Although the Port Authority did not oppose applicants' motion for intervention, it strongly denied their assertion that it would fail to defend the suit with due diligence. (See App. 94-95.) The trial court properly found that any claim by applicants that the Port Authority is likely to be remiss in its defense of the case was unfounded and speculative.*

Even assuming, arguendo, that there is some difference between the ultimate interests of applicants and the Port Authority, this "does not necessarily show inadequacy, if they both seek the same outcome." Nuesse v. Camp, 385 F.2d 694, 703 (D.C. Cir. 1967). Here "there is not the slightest degree of meaningful adversity" between applicants and the Port Authority in the context of the present suit. Moore v. Tangipahoa Parish School Board, 298 F. Supp. 288, 292 (E.D. La. 2969). Each seeks the same outcome. Thus, there is no basis for applicants' claim that the Port Authority will not represent

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* The applicants' suggestion that the Port Authority may not vigorously pursue the defense of this litigation is belied by the comprehensive 65-page brief submitted in opposition to plaintiffs' motion for summary judgment by the Authority. Moreover, extensive briefs in opposition were also submitted by other amici.

this interest.*

Applicants rely heavily on Trbovich v. United Mine Workers of America, 404 U.S. 528 (1972), and New York Pub. I.R.G., Inc. v. Regents of the Univ. of St. of N.Y., 516 F.2d 350 (2d Cir. 1975), for the view that, where applicants for intervention and their putative representatives have differing interests, applicants should be permitted to intervene. Neither case stands for so sweeping a proposition. In each case the court concluded that there was a significant danger that the representation offered applicants for intervention would be inadequate, in light of the finding that substantial conflicts in interest existed between applicants and the original parties allegedly representing their interests. In Trbovich, the Supreme Court found material differences in interest between the Secretary of Labor and an individual union member seeking to intervene to challenge a union election because of potentially conflicting statutory duties imposed upon the Secretary and found further that such differences were so substantial that "the union member may have a valid complaint about the performance of 'his lawyer.'" 404 U.S. at 539.

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* While applicants are correct that the Port Authority is not interested in developing a record detailing the possible impact of Concorde flights at JFK, this fact merely underscores the substantial difference between the lawsuit pending between the parties and the one that applicants want to instigate.

Similarly in the New York Pub. I.R.G., Inc. case, the putative representatives had admitted that their interests "'may significantly differ'" from those of applicants for intervention, 516 F.2d at 352, and these differences were found to be so substantial as to go to the heart of the lawsuit.

Both decisions are thus readily distinguishable as they involved instances where there was a clear factual showing of very substantial differences between the interests of the applicants for intervention and their representatives that indicated the likelihood that the two would seek different and incompatible outcomes in the case. Here, applicants failed to make such a showing and have not sought to reapply for intervention (although permitted to do so by the lower court) by presenting factual support for their otherwise unfounded allegations of inadequate representation.

II

PERMISSIVE INTERVENTION WAS PROPERLY DENIED

Applicants have not shown that the district court's denial of their motion to intervene pursuant to Rule 24(b) constituted an abuse of discretion. Securities & Exch. Com'n v. Everest Management Corp., 475 F.2d 1236 (2d Cir. 1972).*

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* As this court noted in Everest, "there is not a single reported case in which an appellate court has reversed [a district court] solely because of an abuse of discretion in denying permissive intervention." Id. at 1240.

Among other things, Rule 24(b) provides that "[i]n exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." The district court correctly determined that a grant of permissive intervention would unavoidably confuse the proceedings and prevent a prompt adjudication of "narrow legal questions placed in issue by the pleadings in this action." (App. 114-15.)

This suit does not call for relitigating the many issues of public policy considered by Secretary Coleman in making his decision to authorize Concorde flights, sustained by the Court of Appeals for the District of Columbia Circuit. Applicants openly acknowledge that they wish to relitigate the propriety and desirability of Concorde flights, even going so far as to challenge Secretary Coleman's authority to render his Concorde decision. (See Sixth Defense of Applicants, App. 78.) Many of these issues -- such as the authority of the Secretary of Transportation to make the Concorde decision -- were raised on the petitions for review of the Secretary's decision in the District of Columbia Court of Appeals. (See p. 3, supra.) The court held that the Secretary had the requisite authority and had properly exercised it. None of the applicants participated in the review proceeding.

The district court's order would prevent applicants from making a "Donnybrook Fair" of the proceedings, Crosby

S. Gage & Valve Co. v. Manning, Maxwell & Moore, 51 F. Supp. 972, 973 (S.D.N.Y. 1943), while at the same time giving them every opportunity to present their legal theories in briefs as amici curiae. In the circumstances, it cannot be fairly said that the court abused its discretion by denying permissive intervention under Rule 24(b).

CONCLUSION

Plaintiffs brought this action to challenge the power of the Port Authority to ban Concorde flight operations at JFK. The sole question raised is whether the Port Authority or the federal executive officer entrusted by Congress with appropriate responsibility should decide whether Concorde flights will be permitted at JFK.

The "interest" asserted by applicants to justify their intrusion into plaintiffs' lawsuit is inadequate to establish applicants' right to intervene under Rule 24. The district court correctly determined that applicants' interests would be completely protected by the Port Authority, coupled with applicants' participation in the suit as amici curiae. At the same time, the court expressly provided that applicants could renew their motion to intervene should the Port Authority fail to defend its position diligently.

The district court's order denying intervention should be affirmed.

Respectfully submitted,

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Applicants for Intervention-Appellants.

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AFFIDAVIT OF SERVICE BY MAIL

- -x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

The undersigned, being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 500 East 85th Street, Apt. 15A, New York, New York 10028.

That on September 22, 1976, deponent served the annexed BRIEF OF APPELLEES BRITISH AIRWAYS BOARD AND COMPAGNIE NATIONALE

AIR FRANCE on the following attorneys for the respective parties in this action at the address designated by said attorneys for that purpose:

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by depositing two true copies of same enclosed in a postpaid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Timothy R. Cappel
Timothy R. Cappel

Sworn to before me this
22nd day of September, 1976.

Notary Public

[illegible]
NOTARY PUBLIC, State of New York
No. 03-4620928
Qualified in New York County
Commission Expires March 30, 1977